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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JEREMIAH PIEHL, Defendant and Appellant.	D058125 (Super. Ct. No. SCE294903) (Super. Ct. No. SCE295579)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed in part, reversed in part, and remanded with directions.

This case (No. SCE294903) arose when jewelry and a television were stolen from the victims' home. A jury convicted Robert Jeremiah Piehl of one count each of first degree burglary (count 1: Pen. Code, §§ 459, 460 (undesignated statutory references will be to the Penal Code unless otherwise specified)), grand theft (count 2: § 487, subd. (a)), receiving stolen property (count 3: § 496, subd. (a), hereafter § 496(a)), misdemeanor possession of paraphernalia used for narcotics (count 4: Health & Saf. Code, § 11364), and misdemeanor possession of a hypodermic needle or syringe (count 5: Bus. & Prof.

Code, § 4140). Piehl admitted a sentencing enhancement allegation that he had served two prior prison terms within the meaning of section 667.5, subdivision (b).

The court sentenced Piehl to the middle term of four years for his first degree burglary conviction, plus a two-year enhancement for the true findings on the prior prison term allegations. The court imposed, but stayed under section 654, a two-year middle term for his grand theft conviction and a two-year middle term for his receiving stolen property conviction.[1]

Piehl appeals, contending his count 3 conviction of receiving stolen property should be stricken because a defendant may not be lawfully convicted of both stealing and receiving the same property. The People concede this conviction must be reversed.

Piehl also contends his count 1 conviction of first degree burglary should be reversed and the matter remanded for a new trial on that count because the court prejudicially erred and violated his federal constitutional right to due process by failing sua sponte to instruct the jury under CALCRIM No. 1702 on the duration of the crime of burglary for purposes of assessing aiding and abetting liability, and the prosecutor committed prejudicial misconduct by arguing to the jury that it could find him guilty of burglary as an aider and abettor if it found he carried the television away in his car.

We conclude Piehl's conviction of receiving stolen property must be stricken because he cannot lawfully be convicted of both stealing and receiving the same property.

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1 The court also imposed a consecutive eight-month sentence in a consolidated but unrelated case (*People v. Piehl* (Super. Ct. San Diego County, 2009, No. SCE295579)) for his conviction of two counts of unlawful possession of a firearm by a felon (§ 12021, subd. (a)(1).)

We also conclude that his conviction of first degree burglary must be reversed and the matter remanded for a new trial on that count.

FACTUAL BACKGROUND

A. *The People's Case*

On September 22, 2009, at around 7:00 a.m., Eboney Hinds, then a high school senior living with her family in Spring Valley, drove herself to school. Her mother, Angelica Wallace-Hinds, left the house at about the same time to go to work. Before they left, all of the doors of the home were locked, and the windows and gates were closed. The house has a fenced back yard with two unlocked side gates through which anyone could enter the yard through the fence.

Hinds returned home at around 2:00 p.m., parked her car in the driveway, and walked towards the front door. As she approached the house, she noticed Piehl standing alone on the porch of the house next door. When Piehl saw Hinds approaching her front door, he made a whistling sound and said, "Hey." Hinds testified it "[s]ounded like he was talking out to someone. "

Hinds entered her house and heard her puppies barking, which was unusual. Nobody else was home at the time. She went directly to her room and noticed her black flat-screen television was gone. She thought her mother had taken it as punishment. When she called her mother to complain, Wallace-Hinds responded that she had not taken the television. Hinds went into her mother's room where her mother kept the family jewelry and found the drawers were open and all of the jewelry was gone.

Wallace-Hinds later estimated the value of the stolen jewelry was in excess of $150,000. Her mother told her to go outside and call the police.

On her way out of the house, Hinds walked through the kitchen and noticed the back door was open, there was a footprint in the sink, and the kitchen window screen had been cut out. She also noticed the cords of the computer in the office had been pulled out from the wall. Hinds dialed 911 as she walked outside to the front of the house and spoke to the operator from her front porch. Hinds had been in the house for about 20 minutes before she called the police.

After she called the police, Hinds noticed that Piehl was still standing on the porch next door, as if he was waiting. As she watched him, Piehl walked to a dark blue convertible that was parked nearby with the top down, got inside, backed the car up the driveway across the street, drove slowly down the street in front of Hinds, stopped the car in front of Hinds, and asked her if something was wrong. Hinds saw her television face down on the back seat of the car. She recognized her initials "E.J.H." written in the dust on the back of the television. Hinds memorized some of the numbers on the license plate of the car Piehl was driving, called the police again, and reported what she had observed.

About two hours later, San Diego County Deputy Sheriff Jerry Jimenez responded to Hinds's call and spoke with Hinds and her mother, who had arrived home from work. Deputy Jimenez observed that Wallace-Hinds's bedroom had been ransacked, and he could see the spot in Hinds room from which her television had been stolen. The window screen above the kitchen sink was ripped and may have been the burglar's point of entry.

Deputy Jimenez dusted for fingerprints, but none of the fingerprints were identified as belonging to Piehl, and the police never determined to whom they belonged. A detective testified that it is "very common" for more than one person to participate in a residential burglary. One participant acts as a lookout while the other enters the home.

After Deputy Jimenez left the house, and as Wallace-Hinds was speaking to her neighbors as she stood in her driveway, a blue convertible slowly drove by, which seemed suspicious. After Hinds confirmed the car matched the description of the car she had seen Piehl driving earlier, Wallace-Hinds and a neighbor followed the car to a gated community, but the car was parked with no one in it when they arrived. Wallace-Hinds took a picture of the car and sent it to her daughter. When Hinds confirmed it was the same vehicle she had seen Piehl driving earlier, Wallace-Hinds called the police.

Deputy Jimenez responded to Wallace-Hinds's call, determined that the license plate number matched the one Hinds had provided, and looked inside the car. The jewelry and television were not in the car. Deputy Jimenez later determined that Piehl was the registered owner of the car that both Hinds and Wallace-Hinds had seen.

Piehl lived with his brother, Joseph Piehl, who, in the afternoon of the day of the burglary observed via a surveillance camera as Wallace-Hinds and Deputy Jimenez examined and photographed Piehl's car. Joseph Piehl told his brother what he had observed.

A search warrant was executed at Piehl's home, but the stolen property was not found.

Piehl was arrested on October 6, 2009. During a search incident to his arrest, an officer discovered in Piehl's pocket a glass pipe used to smoke methamphetamine. Later, Piehl was observed attempting to throw away a hypodermic needle that later tested positive for the presence of methamphetamine. Piehl appeared to be under the influence of methamphetamine at the time of his arrest.

B. *The Defense Case*

Piehl did not testify. Sometime in September 2009, one of Piehl's coworkers gave him a big older model computer monitor. The monitor was had a depth of approximately 12 inches and could not have been mistaken for a plasma flatscreen television.

Eduardo De La Toba, who lived next door to Wallace-Hinds's home, met Piehl in September 2009 before the burglary. De La Toba, who worked at a thrift store, told Piehl he needed a working computer power-supply part, and Piehl said he might have one. Piehl went to De La Toba's home to pick up the broken computer part in order to see whether he had a working matching part to replace De La Toba's. De La Toba was uncertain when this occurred, but it was in the middle of September. Piehl never returned to De La Toba's home.

DISCUSSION

I. *PIEHL'S RECEIVING STOLEN PROPERTY CONVICTION MUST BE STRICKEN*

Piehl first contends his conviction of receiving stolen property should be stricken because a defendant may not lawfully be convicted of both stealing and receiving the same property. Citing *People v. Ceja* (2010) 49 Cal.4th 1 (*Ceja*), the People agree this conviction must be reversed.

We accept the People's acknowledgment that Piehl's conviction of receiving stolen property cannot stand. In *Ceja*, the California Supreme Court explained that, "[i]n 1992, the Legislature amended the statutory definition of receiving stolen property [in section 496(a)] to add this declaration: 'A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.' " (*Ceja*, *supra*, 49 Cal.4th at p. 4, quoting § 496(a), as amended by Stats. 1992, ch. 1146, § 1, p. 5374.) Thus, the high court explained, in cases involving stolen property, " 'if the defendant is found to be the thief he cannot be convicted of receiving the same property, and where he is so convicted it is the receiving conviction which is improper. For this reason it is always the receiving conviction which cannot stand . . . .' " (*Ceja*, at p. 6, quoting *People v. Stewart* (1986) 185 Cal.App.3d 197, 209, which was overruled on another ground in *People v. Allen* (1999) 21 Cal.4th 846, 864, 866.)

Accordingly, we reverse Piehl's count 3 conviction and remand the matter to the trial court with directions to strike that conviction. (See *People v. Recio* (2007) 156 Cal.App.4th 719, 727 ["The judgment is reversed and remanded to the trial court with directions to strike the conviction for receiving stolen property."].)

II. *PIEHL'S FIRST DEGREE BURGLARY CONVICTION MUST BE REVERSED*

Piehl also contends his first degree burglary conviction should be reversed and the matter remanded for a new trial on that count for three principal reasons. First, the court prejudicially erred and violated his federal constitutional right to due process by failing sua sponte to instruct the jury under CALCRIM No. 1702 that, to be guilty of burglary as

an aider and abettor, Perry must have formed the intent to aid and abet the perpetrator *before* the perpetrator left the victims' home. Second, the prosecutor committed prejudicial misconduct by telling the jury during her rebuttal closing arguments that it could find Piehl guilty of burglary as an aider and abettor if it found he carried the television away in his car. Third, as a result of the court's instructional error and the prosecutor's misconduct, it cannot be determined from the record whether the jury's general first degree burglary verdict "rested on the prosecutor's incorrect theory that [it] could find [Piehl] guilty as an aider and abettor of the burglary" solely based on his act driving away with the stolen property. We conclude Piehl's conviction of first degree burglary must be reversed because the failure to instruct the jury under CALCRIM No. 1702 was prejudicial error.

A. *Background*

During the jury instructions conference outside the presence of the jury, defense counsel objected to the giving of aiding and abetting liability instructions. The defense took the position that there was no specific evidence to support the giving of such instructions and that Piehl either went inside the victims' home or he did not, and he was not guilty of burglary if he did not enter the home. Neither party requested that the jury be instructed under CALCRIM No. 1702, which states:

> "To be guilty of burglary as an aider and abettor, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage commission of the burglary *before* the perpetrator finally left the structure." (Italics added.)

There was no discussion about whether the court should give CALCRIM No. 1702, and the court did not sua sponte give that instruction.

The court overruled the defense's objection to the giving of aiding and abetting instructions. Thereafter, the court generally instructed the jury on the principles of aiding and abetting in accordance with CALCRIM Nos. 400 and 401, as well as on the elements of burglary in accordance with CALCRIM No. 1700.[2]

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2 CALCRIM No. 400 states: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator."

CALCRIM No. 401 states: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] [If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. [¶] However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor." (Italics omitted.)

During her closing arguments, the prosecutor first argued the jury could find Piehl guilty of burglary on the theory he was the perpetrator who entered the victims' home. She also argued Piehl aided and abetted the burglary by acting as the lookout.

In her rebuttal arguments, the prosecutor conceded she had no evidence to show Piehl was the perpetrator, but argued the jury could find him guilty of aiding and abetting the perpetrator either on the theory he was the lookout, or on the alternative theory he helped to carry away the stolen property:

> "No, I can't place him inside the house. He was not caught inside the house. That doesn't mean he didn't go [in]. His prints weren't found, that's true. . . . He could have wor[n] gloves. He could have stood at the back gate and grabbed the TV from the other guy and carried it to the car. He could have touched things in the bedroom that weren't dusted. I don't know. *He could have been the lookout*, which I believe he was. I think the evidence suggests that. Those two things, *if he was the lookout or he helped carry away the property in any way, he's guilty. He's guilty under that theory*.
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> "[*H*]*e's also guilty if he helped carry away the property, as an aider and abettor. If that was* [*Hinds's*] *TV in that car that had been stolen from that burglary and he helped carry it away in the car, that's also an aider and abettor. Without his vehicle and without him driving that property away, that TV wouldn't have gone out of that yard. He's still an aider and abettor*."

CALCRIM No. 1700 states: "The defendant is charged in Count One with burglary. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant entered a building; [¶] AND [¶] 2. When he entered a building he intended to commit theft. [¶] To decide whether the defendant intended to commit theft, please refer to the separate instructions that I will give you on that crime. [¶] A burglary was committed if the defendant entered with the intent to commit theft. The defendant does not need to have actually committed theft as long as he entered with the intent to do so. [¶] The People allege that the defendant intended to commit theft. You may not find the defendant guilty of burglary unless you all agree that that he intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes he intended."

On appeal, Piehl acknowledges his trial counsel did not object to the prosecutor's rebuttal closing argument that Piehl could be convicted of aiding and abetting burglary if it found he helped carry away the stolen property.

During deliberations, the jury sent a note to the court that stated:

> "Does aiding and abetting fall under the burglary charge? If we find that [Piehl] was aiding & abetting do we find him guilty of burglary? [¶] [A]nd then is it considered 1st degree"

The jury thereafter returned a general verdict finding Piehl guilty of first degree burglary as charged in count 1.

B. *Applicable Legal Principles*

1. *Duty to sua sponte to instruct the jury*

"'"[I]n criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) '"'The general principles of law [that govern] a case are those principles that are closely and openly connected with the facts before the court and . . . are necessary for the jury's understanding of the case."'" (*Ibid*.)

"[A]n instructional error that improperly . . . omits an element of an offense . . . generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution." (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Such an error is reviewed under the harmless error standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Flood*, at pp. 502-503.) Under the *Chapman* standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record,

that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *Chapman*, at p. 24.)

2. *Aiding and abetting burglary*

Under section 459, the crime of burglary is committed when a person "enters any . . . building . . . with intent to commit grand or petit larceny or any felony . . . ." (See also § 460 [burglary is of the first degree when the building is an inhabited structure].)

"Because section 31[3] defines as principals all who directly commit a given offense or who aid and abet in its commission, the same criminal liability attaches whether a defendant directly perpetrates the offense or aids and abets the perpetrator." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1038-1039 (*Montoya*), italics omitted.)

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "It is settled that if a defendant's liability for an offense is predicated upon the theory that he or she aided and abetted the perpetrator, the defendant's intent to encourage or facilitate the actions of the perpetrator 'must be formed

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3 Section 31 provides: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed."

prior to or during "*commission*" of that offense.' " (*Montoya, supra*, 7 Cal.4th at p. 1039, quoting *Cooper*, at p. 1164, italics added by Cooper.)

In *Montoya*, the California Supreme Court held that, for purposes of assessing the liability of a person who aids and abets a burglary, "the commission of a burglary does not terminate . . . upon the perpetrator's entry into the structure, but rather continues until the perpetrator's departure from the structure." (*Montoya, supra*, 7 Cal.4th at pp. 1040, 1046.) Thus, the *Montoya* court explained, "for the purpose of assessing the liability of an aider and abettor, a burglary is considered ongoing during the time the perpetrator remains inside the structure." (*Id*. at p. 1045.) Accordingly, in a burglary case, a defendant cannot be held liable as an aider and abettor unless "he or she, with knowledge of the perpetrator's unlawful purpose, forms the intent to commit, encourage or facilitate commission of the offense at any time *prior to the perpetrator's final departure from the structure*." (*Id*. at p. 1046, italics added.) Stated differently, a defendant in a burglary case cannot be held liable as an aider and abettor if he or she formed the intent to commit, encourage or facilitate the commission of the offense *after* the perpetrator's final departure from the structure. (*Ibid*.)

Asportation (or carrying away) of stolen property is not an element of the crime of burglary. (*Montoya, supra*, 7 Cal.4th at p. 1041.) Thus, liability for aiding and abetting a burglary "[does] *not* extend to a person who simply aided a burglar in the asportation of the stolen property *after* its removal from the burgled structure." (*Ibid*., second italics added.)

C. *Analysis*

We reach the merits of Piehl's instructional error claim. Section 1259 provides that, "[u]pon an appeal taken by the defendant, the appellate court may . . . review any . . . instruction . . . refused . . . if the substantial rights of the defendant were affected thereby." Here, Piehl may properly raise his instructional error claim on appeal despite defense counsel's failure to request the giving of CALCRIM No. 1702 because we conclude the court had a duty sua sponte to give that instruction but failed to do so, and such failure affected Piehl's substantial right to be tried by a jury properly informed with regard to the law pertaining to aiding and abetting a burglary, particularly the intent element of such aiding and abetting liability.

As noted, the prosecutor argued the jury could convict Piehl of aiding and abetting the burglary on either of two theories: he aided and abetted the perpetrator (1) by acting as the lookout, or (2) by "in any way" carrying away stolen property, Hinds's television, which Hinds testified she saw on the back seat of Piehl's convertible as he was driving away.

In convicting Piehl of first degree burglary, the jury returned a general verdict, and it cannot be determined from the record on which of the two alternative aiding and abetting theories the jury based its guilty verdict. For this reason alone, reversal of Piehl's burglary conviction is required. "When a prosecutor relies on alternate theories, some of which are legally correct and others which are legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Mendez* (2010) 188

Cal.App.4th 47, 59 (*Mendez*), citing *People v. Morales* (2001) 25 Cal.4th 34, 43 (*Morales*); see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1122.)

Here, given the evidence presented at trial, the prosecutor's second theory—that Piehl could be held liable for aiding and abetting the burglary if the jury found he carried away the stolen television "in any way"—was legally incorrect. As we have explained, the carrying away of stolen property is not an element of the crime of burglary (*Montoya, supra,* 7 Cal.4th at p. 1041), and a defendant charged with burglary cannot be held liable as an aider and abettor if he formed the intent to commit, encourage or facilitate the commission of the offense *after* the perpetrator's final departure from the burglarized structure (*id*. at p. 1046). In this case, it is undisputed the prosecution presented no evidence from which a reasonable jury could find Piehl formed the intent to carry away Hinds's stolen television *before* the unknown perpetrator finally left the victims' home. For purposes of assessing Piehl's alleged aiding and abetting liability, the trial record is devoid of any evidence establishing when the perpetrator finally left the victims' home. Thus, Piehl's burglary conviction cannot stand because it cannot be determined whether the jury found him guilty of aiding and abetting the burglary based on the legally incorrect theory he is culpable merely because he carried away Hinds's stolen television. (See *Morales*, *supra*, 25 Cal.4th at p. 43; *Mendez, supra,* 188 Cal.App.4th at p. 59.) Furthermore, we cannot conclude the court's error in failing to sua sponte instruct the jury under CALCRIM No. 1702 was harmless beyond a reasonable doubt. (See *Flood*, *supra*, 18 Cal.4th at pp. 502-503; *Chapman*, *supra*, 386 U.S. at p. 24.)

We reject the Attorney General's claim that the instructions the court gave to the jury—CALCRIM Nos. 400, 401, and 1700 (see fns. 3-4, *ante*)—"fully and completely informed the jury of the essential elements that had to be proven before [Piehl] could be found guilty of aiding and abetting the burglary." In support of this claim, the Attorney General asserts "the jury was informed pursuant to CALCRIM No. 1700 that a burglary is *complete* whenever a defendant *enters* a building with the intent to commit theft." (Italics added.) While this assertion is correct as it pertains to a burglary committed by a perpetrator, it is incorrect as it relates to a burglary committed by an aider and abettor. The Attorney General disregards the California Supreme Court's holding in *Montoya*, which Piehl discusses in his opening brief, that, for purposes of assessing aiding and abetting liability, "the *commission of a burglary* does not terminate . . . upon the perpetrator's entry into the structure, but rather *continues until the perpetrator's departure from the structure*." (*Montoya*, *supra*, 7 Cal.4th at p. 1040, italics added.) None of the three standard jury instructions on which the Attorney General relies informed the jury that a defendant cannot be held liable as a burglary aider and abettor unless "he or she, with knowledge of the perpetrator's unlawful purpose, forms the intent to commit, encourage or facilitate commission of the offense at any time *prior to the perpetrator's final departure from the structure*." (*Id.* at p. 1046, italics added.)

Accordingly, we reverse Piehl's burglary conviction. In light of our decision, we need not reach the merits of Piehl's related claim that the prosecutor committed misconduct in violation of his federal constitutional right to due process.

DISPOSITION

Piehl's convictions of first degree burglary (count 1) and receiving stolen property (count 3) are reversed. His conviction of grand theft (count 2) is affirmed. The matter is remanded to the trial court with directions to strike Piehl's conviction of receiving stolen property and to conduct such further proceedings as may be necessary consistent with this opinion, including a new trial as to count 1 and a new sentencing hearing.

NARES, J.

WE CONCUR:

McCONNELL, P.J.

BENKE, J.